

9-1-2005

# The First Amendment, Journalism & Credibility: A Trio of Reforms for a Meaningful Free Press More than Three Decades after Tornillo

Clay Calvert

Follow this and additional works at: <http://scholarship.law.unc.edu/falr>



Part of the [First Amendment Commons](#)

---

## Recommended Citation

Clay Calvert, *The First Amendment, Journalism & Credibility: A Trio of Reforms for a Meaningful Free Press More than Three Decades after Tornillo*, 4 FIRST AMEND. L. REV. 9 (2018).

Available at: <http://scholarship.law.unc.edu/falr/vol4/iss1/3>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in First Amendment Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact [law\\_repository@unc.edu](mailto:law_repository@unc.edu).

# **THE FIRST AMENDMENT, JOURNALISM & CREDIBILITY: A TRIO OF REFORMS FOR A MEANINGFUL FREE PRESS MORE THAN THREE DECADES AFTER *TORNILLO***

**CLAY CALVERT\***

## **INTRODUCTION**

It is a fundamental tenet of First Amendment<sup>1</sup> jurisprudence that, in the print medium, editing is for editors.<sup>2</sup> The

---

\* Associate Professor of Communications & Law, Co-Director of the Pennsylvania Center for the First Amendment, and Interim Dean of the Schreyer Honors College at The Pennsylvania State University. B.A., 1987, Communication, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; Ph.D., 1996, Communication, Stanford University. Member, State Bar of California. The author thanks The Pennsylvania State University for providing a one-semester sabbatical that helped make possible the early phases of the research, writing, and publication of this article. In addition, the author thanks Professor Blake Morant of the Washington & Lee School of Law and Professors Arnold Loewy and William Marshall of the University of North Carolina School of Law for their helpful comments.

1. The First Amendment to the United States Constitution provides in relevant part that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses have been incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. *See* *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (“For present purposes we may and do assume that freedom of speech and of the press – which are protected by the First Amendment from abridgment by Congress – are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”).

2. The United States Supreme Court has suggested that the same principle holds true for the broadcast realm as well as the print medium. *See*

United States Supreme Court made this emphatically clear slightly more than three decades ago in *Miami Herald Publishing Co. v. Tornillo*,<sup>3</sup> striking down a right-of-reply statute for candidates criticized by newspapers. The Court wrote that “[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials – whether fair or unfair – constitute the exercise of editorial control and judgment.”<sup>4</sup> The *Tornillo* Court thus rejected the notion of governmental authority to compel newspapers to print certain editorial content, and it was not swayed in its decision by a then-developing concentration of corporate newspaper ownership.

Thirty-one years after the *Tornillo* opinion, however, there are new indicators emerging that some minimal measures of government intervention in the print marketplace of ideas<sup>5</sup> are

CBS v. Democratic Nat'l Comm., 412 U.S. 94, 124 (1973) (writing, in the context of a broadcasting case, that “[f]or better or worse, editing is what editors are for; and editing is selection and choice of material”). In broadcasting, however, the Court has upheld rules, such as the fairness doctrine, that intrude into editorial discretion. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (upholding the FCC's application of the fairness doctrine and reasoning that government control is necessary for fair allocation of scarce broadcast frequencies).

3. *Miami Herald Publ'g v. Tornillo*, 418 U.S. 241 (1974) (holding that “the Congress and the Commission do not violate the First Amendment when they require a radio or television station to give reply time to answer personal attacks and political editorials”).

4. *Id.* at 258.

5. The marketplace of ideas is a theory or rationale that “represents one of the most powerful images of free speech, both for legal thinkers and for laypersons.” MATTHEW D. BUNKER, *CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY 2* (2001). As Professor Martin Redish writes, “[o]ver the years, it has not been uncommon for scholars or jurists to analogize the right of free expression to a marketplace in which contrasting ideas compete for acceptance among a consuming public.” Martin H. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 NW. U. L. REV. 1083, 1083 (1999). Importantly, for purposes of this article on the anniversary of *Tornillo*, the Supreme Court has embraced this metaphor. *Tornillo*, 418 U.S. at 251 (writing that economic

necessary. Simultaneously, the concentration of newspaper ownership discussed in *Tornillo* has accelerated tremendously since the Supreme Court handed down that opinion.<sup>6</sup> Yet, the number of daily newspapers, as well as the number of cities with competing newspapers<sup>7</sup> and the size of readership,<sup>8</sup> has dwindled substantially.

---

factors “have made entry into the marketplace of ideas served by the print media almost impossible”).

6. University of Georgia Professor Joseph R. Dominick writes that one of the “two most significant facts about newspaper ownership” is that “[c]oncentration of ownership is increasing as large group owners acquire more papers.” JOSEPH R. DOMINICK, *THE DYNAMICS OF MASS COMMUNICATION* 107 (8th ed. 2005). For instance, in July 2004, Gannett Co., Inc. owned “99 daily newspapers in the USA [that] have a combined daily paid circulation of 7.6 million” and it was “the USA’s largest newspaper group in terms of circulation.” Gannett Co. Company Profile, <http://www.gannett.com/map/gan007.htm> (last visited Sept. 23, 2005).

Today, chains own “more than 80 percent of all papers.” RALPH E. HANSON, *MASS COMMUNICATION: LIVING IN A MEDIA WORLD* 131 (2005) (emphasis added). In contrast, in 1974 when the Supreme Court wrote its opinion in *Tornillo*, the Court cited the fact that “[n]early half of U.S. daily newspapers . . . are owned by newspaper groups and chains, including diversified business conglomerates.” *Tornillo*, 418 U.S. at 249 n.13 (emphasis added). This represents a vast increase, suggesting a very different factual scenario that beckons for the Court to reconsider the outcome in *Tornillo*.

7. Today, less than 1% of cities have competing daily newspapers. HANSON, *supra* note 6, at 131. Deepening distrust of the media over the past three decades “reflects the widespread loss of competing daily newspapers and the public’s discontent at the paucity of choices for getting the news in print.” Ellen Soeteber, *Post-Dispatch Strives To Protect Our Work’s Integrity*, ST. LOUIS POST-DISPATCH, May 18, 2003, at B1. Joseph Dominick observes that “by 2003, there were only a dozen cities that had independent competing newspapers. In another 12 cities competition was kept alive only through a joint-operating agreement.” DOMINICK, *supra* note 6, at 108. The Newspaper Preservation Act of 1970, adopted just four years before *Tornillo*, allowed for joint operating agreements “between daily newspapers competing in the same market. The idea then was to preserve competition, but most of the 30 or so agreements have failed, with the folding of the weaker paper. Seattle is one of 12 cities where the agreements – and two jointly operated newspapers – have survived.” Blaine Harden, *Under Court Ruling, Seattle To Remain a 2-Paper Town*, WASH. POST, Sept. 26, 2003, at A2; see also Newspaper Ass’n of Am., *Facts About Newspapers 2003* 17 (2003), available at [http://www.naa.org/info/facts03/17\\_facts2003.html](http://www.naa.org/info/facts03/17_facts2003.html) (identifying the twelve cities in which joint operating agreements were in place in 2003).

In particular, this Article contends that intervention is needed to revitalize and restore the notion of a free press as a vital and credible component of a democratic society in which, as the Court has observed, “[t]he press plays a unique role as a check on government abuse”<sup>9</sup> and serves “as a watchdog of government activity.”<sup>10</sup> This is a role not just recognized by the judiciary, but one that pervades the very ethos of the journalism profession. As Columbia University Professor Herbert Gans recently wrote, the watchdog role represents “the journalists’ finest opportunity to show that they are working to advance democracy.”<sup>11</sup> Only when the press is seen as credible by the public, when it is perceived as working to advance democracy, rather than working to advance profits or a hidden political agenda, can it play an effective watchdog role. If the press is not seen as credible, the metaphorical watchdog will not be trusted.

The timing for this proposal for intervention could not be more important or propitious because the country is coming out of a bitter presidential election year, engaged in an on-going and open-ended war on terrorism, and fighting battles on a nearly daily basis in Iraq and Afghanistan. These are times that require a press that captures both public attention and, more importantly, public respect.

The ultimate purpose of this Article is to suggest three governmental interventions to address the problem of press credibility. Part I of this Article examines three very recent data points or sets of indicators that, when viewed collectively and in light of other facts, militate in favor of government intervention in the print medium in order to revitalize an important and credible free press.<sup>12</sup> In particular, the data reveals that many journalists in

---

8. See DOMINICK, *supra* note 6, at 115 (writing that “the percentage of adults reading one or more papers every day has declined from about 80 percent in the early 1960s to about 57 percent in 2003” and noting that “[d]aily newspaper circulation, in absolute terms, has decreased since 1970” while the overall population in the United States has increased).

9. *Leathers v. Medlock*, 499 U.S. 439, 447 (1991).

10. *Id.* at 448.

11. HERBERT J. GANS, *DEMOCRACY AND THE NEWS* 79 (2003).

12. See *infra* Part I.

the United States believe that their profession is heading in the wrong direction, profit pressures are corrupting the practice of journalism, and the press is not adequately playing its watchdog role, particularly in covering the Bush administration.<sup>13</sup> Many in the American public, the group that ultimately determines whether the press is credible, also believe the press has too much freedom to publish what it wants. Furthermore, a sizable segment of the public is very concerned about the dangers of further media conglomeration and unchecked media ownership.

Part II of this Article proposes and defends three specific steps or measures that the government should take toward restoring press credibility.<sup>14</sup> Two of these steps intrude into the editorial realm that *Tornillo* has held so sacred for so long, and the third step deals with structural reformation in the realm of ownership of newspapers. The changes would be implemented at the federal level under a “Newspaper Credibility Enhancement Act,” (“NCEA” or “the Act”) which would include the following provisions:

#### *A. Newspaper Credibility Enhancement Act Provisions*

##### **1. Editorial Decision-Making Explanation**

The Act would require the editors of each daily newspaper published in the United States to devote, once each week, a full page on its op-ed pages to explain how and why they chose the lead stories that ran “above the fold” on the front page for each edition during the previous week. Parsed differently and more bluntly, the editors would be required to explain their news judgment process to the public. To compensate for any and all lost advertising revenue from commercial speech that could have occupied this page, the federal government would be required to pay each newspaper, on a weekly basis and based on that paper’s regular advertising rates, the cost of a full-page advertisement. Newspaper editors who do not

---

13. See *infra* Part I.

14. See *infra* Part II.

want to devote a page to publishing such content in their print editions have the option of posting it on their websites, in which case there would be no governmental compensation.

## 2. Political Party Identification

The Act would also require that journalists identify their registered political party affiliation immediately under their bylines, much as many newspapers now provide the email addresses for journalists. Because journalists often claim to be objective and neutral observers of events regardless of their own biases, they should have no objection to revealing this single piece of information to their readers.

## 3. Ownership Cap

The Act would also impose a cap or limit on the total number of print newspapers that any single entity could own, in order to preserve what little diversity and choice of print news voices remains in the United States.

Taken collectively, these three measures are designed to make the press more meaningful in its day-to-day operations by opening up the process and inspiring a greater trust in the press. This can be accomplished by increasing the public's awareness of how editors choose stories, what stories are available, and the nature of a reporter's party affiliation.

While this Article describes these changes as modest and minimal, they will be radical to free press proponents who start from the court-created "strong presumption that the government will abuse any authority it possesses over the press."<sup>15</sup> It is my hope that this article will provoke discussion that requires both journalists and free-press advocates to explain why, beyond the

---

15. LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 20 (1991). Lee Bollinger is a well-known First Amendment scholar and the President of Columbia University. In fact, I lay out this three-pronged Newspaper Credibility Enhancement Act with some hesitation and trepidation, as I am a co-director of a center dedicated to the protection of the First Amendment.

usual, well-worn fears of the slippery slope of government regulation,<sup>16</sup> the measures set forth in the proposed “Newspaper Credibility Enhancement Act” should not be adopted.

### I. SIGNS OF A TROUBLED PRESS & THE NEED FOR GOVERNMENT INTERVENTION

There are three sets of data, complemented by both additional facts and the scholarly analysis of others, from which this article draws strength to argue that some measure of government regulation of the print medium is needed to revitalize the free press. Before addressing this information, however, it is important to understand the connection between the concept of credibility and its relationship to a free press. The information indicates, as will be seen, that there are serious credibility problems for the press as perceived both by journalists and members of the public.

Credibility is “a mainstay of the journalistic enterprise.”<sup>17</sup> A leading journalism ethics book, for instance, cautions that journalists should strive not to “damage their own or their organization’s credibility.”<sup>18</sup> When journalists such as Jayson Blair<sup>19</sup>

---

16. University of Iowa Law Professor Randall P. Bezanson observes that First Amendment jurisprudence “is filled with . . . slippery slope arguments.” Randall P. Bezanson, *Speaking Through Others’ Voices: Authorship, Originality, and Free Speech*, 38 WAKE FOREST L. REV. 983, 1078 (2003). The slippery slope argument against the proposals for reform called for in this article likely will take the form of the assertion that, if these proposals become law, more and more governmental intervention in the realm of editorial control of print newspapers will occur in the future. In other words, the “Newspaper Credibility Enhancement Act” will be seen as the camel’s nose under the metaphorical tent of First Amendment protection.

17. LOUIS A. DAY, *ETHICS IN MEDIA COMMUNICATIONS* 71 (4th ed. 2003). Louis Day is a professor at Louisiana State University.

18. JAY BLACK ET AL., *DOING ETHICS IN JOURNALISM* 115 (3d ed. 1999).

19. See generally Dan Barry, David Barstow, Jonathan D. Glater, Adam Liptak & Jacques Steinberg, *Correcting the Record; Times Reporter Who Resigned Leaves Long Trail of Deception*, N.Y. TIMES, May 11, 2003, at A1 (describing how Blair, a twenty-seven year old reporter for the *New York Times*, “committed frequent acts of journalistic fraud while covering significant news events” and “misled readers and *Times* colleagues with dispatches that purported to be from Maryland, Texas and other states, when



and Jack Kelley<sup>20</sup> fabricate information, other journalists lament that such actions harm their already “low credibility scores with the public.”<sup>21</sup> For instance, Blair, a reporter for the *New York Times*, was called to the mat for having “damaged the *credibility* of America’s most prestigious newspaper.”<sup>22</sup> Indeed, it was among the *Times*’ top priorities prior to the Blair fiasco to expand and market its operations “based on one idea: the *credibility* of the *Times* brand.”<sup>23</sup>

Other events such as the Dan Rather fiasco involving “now discredited documents [which raised] new questions about President Bush’s National Guard service”<sup>24</sup> on *60 Minutes* during the election season further support the notion that reforms are necessary to restore respect for the press. Recall that in the *60 Minutes* incident, a “producer acted as a conduit between the network’s source for the documents and Sen. John Kerry’s presidential campaign,”<sup>25</sup> thereby scuttling any appearance of objectivity on the part of what once was called the Tiffany Network. Indeed, Rather “had to make a humbling public apology. And matters got worse when it was reported that Mary Mapes, a veteran field producer largely responsible for the story, had acted

---

often he was far away, in New York. He fabricated comments. He concocted scenes. He lifted material from other newspapers and wire services.”).

20. See generally Charles Lane, *Charmed, I’m Sure*, WASH. POST, May 2, 2004, at B3 (describing how Jack Kelley, a journalist for *USA Today*, engaged in “years of fabricating news stories” which, in 2004, resulted in the “ouster of two of the paper’s top editors and the reassignment of another”).

21. Gregory Favre, *Press Confronts Breach of Trust*, S.F. CHRON., May 2, 2004, at E2.

22. Mark Jurkowitz, *Two Top Editors Resign at Times in Blair Fallout*, BOSTON GLOBE, June 6, 2003, at A1 (emphasis added).

23. Frank Ahrens, *Times Co. Tallies Damage to Brand Done by Scandal*, WASH. POST, June 6, 2003, at E1 (emphasis added). The *New York Times*, of course, is viewed by many political conservatives as anything *but* credible. For instance, in a column conservative writer John Leo derisively refers to the “*New York Liberal Cocoon*,” which presumably references the *New York Times*. John Leo, *The News That’s Fit to Print*, U.S. NEWS & WORLD REP., Oct. 25, 2004, at 88.

24. Dan Gilgoff, *A Fine Mess at CBS*, U.S. NEWS & WORLD REP., Oct. 4, 2004, at 29.

25. *Id.*

unethically by putting her primary source in touch with the John Kerry campaign.”<sup>26</sup> For conservative television news watchers, the event confirmed their worst suspicions about Rather and a liberal bias at CBS, especially when the network ended up terminating four employees involved in the fiasco, including Mapes, in January 2005.<sup>27</sup> An independent report of the incident, conducted by Louis D. Boccardi, a former chief executive of The Associated Press, and Dick Thornburgh, a former attorney general of the United States, concluded “that the network’s news division, in a dash to beat its competitors, suffered a breakdown in judgment as it rushed the report onto the air.”<sup>28</sup> As the panel put it in its own words, it was CBS’s “myopic zeal to be the first news organization to broadcast what was believed to be a new story about President Bush’s TexANG [Texas Air National Guard] service, and the rigid and blind defense of the segment after it aired, despite numerous indications of its shortcomings.”<sup>29</sup>

However, credibility is more than just a journalistic goal. The fact that the press is no longer seen as credible by many journalists and members of the public has major implications for the First Amendment. Press credibility is a central, if not critical, rationale for the constitutional protection of a free press. As the Supreme Court of Washington recognized in 1997, “editorial integrity and *credibility* are core objectives of editorial control and thus merit protection under the free press clauses.”<sup>30</sup> The United States Court of Appeals for the District of Columbia Circuit has

---

26. Howard Rosenberg, *The Restoration of Dan Rather*, BROADCAST & CABLE, Oct. 4, 2004, at 34.

27. See Mark Jurkowitz, *4 Fired at CBS for Report on Bush*, BOSTON GLOBE, Jan. 11, 2005, at A1 (describing the firing of Mapes, senior broadcast producer Mary Murphy, executive producer Josh Howard, and senior vice president for prime time Betsy West).

28. Jacques Steinberg & Bill Carter, *CBS Dismisses 4 Over Broadcast on Bush Service*, N.Y. TIMES, Jan. 11, 2005, at A1.

29. *Placing Blame; What the Panel Said About the ‘60 Minutes’ Report on Bush’s Guard Service*, N.Y. TIMES, Jan. 11, 2005, at C7.

30. *Nelson v. McClatchy Newspapers, Inc.*, 936 P.2d 1123, 1131 (Wash. 1997) (emphasis added). The language from *McClatchy* was later cited favorably by U.S. District Court Judge H. Franklin Waters in *Manson v. Little Rock Newspapers, Inc.*, 42 F. Supp. 2d 856, 866 (E.D. Ark. 1999).

also recognized this premise and wrote that “at least with respect to most news publications, *credibility* is central to their ultimate product and to the conduct of the enterprise.”<sup>31</sup>

When a free press lacks credibility, however, the credibility justification for maintaining its absolute protection and autonomy against government intervention loses its truism-like appeal. As press credibility crumbles, it begins to render hollow and meaningless the value of the special constitutional shield and security afforded the press under the First Amendment. Why should we privilege and provide a profit-making private entity like the press with special constitutional safeguards that are *not* given to other entities if the press is seen as untrustworthy by many people?<sup>32</sup>

Some form of government regulation may be necessary for the press to gain or regain credibility. By doing so, the press will garner more public trust in playing its watchdog function described in the Introduction.<sup>33</sup> With this in mind, Part I of this Article now turns to three sets of data that point to the erosion of press credibility and argues that government intervention is needed to correct the problem.

#### *A. The Pew Research Center Survey of Journalists*

The first source of data is a survey of more than 500 journalists nationwide conducted by the Pew Research Center for

---

31. *Newspaper Guild of Greater Phila. v. NLRB*, 636 F.2d 550, 560 (D.C. Cir. 1980) (emphasis added).

32. Veteran National Public Radio journalist Daniel Schorr suggests such a thesis when he writes that “[t]he press (now more commonly called the news media) continue to insist on constitutional shelter in the public interest while primarily serving substantial private interests and sometimes being accused of acting against the public interest.” Daniel Schorr, *Journalism and the Public Interest*, NIEMAN REPORTS, Summer 2005, at 13.

33. See *Leathers v. Medlock*, 499 U.S. 439, 447 (1991); GANS, *supra* note 11; *supra* text accompanying notes 9-11 (describing the watchdog role of the press).

the People and the Press and released in May 2004.<sup>34</sup> The title of the report, “Bottom-Line Pressures Now Hurting Coverage, Say Journalists,”<sup>35</sup> succinctly captures the gist and sting of its findings. The Pew report includes multiple indicators that the press may no longer be perceived as credible for serving the watchdog goal at the heart of the First Amendment. In particular, the survey results show that:

(1) Two-thirds (66%) of the journalist-respondents who work at national media outlets, believe that bottom-line profit pressures are hurting news coverage. This number increased substantially from 49% in a similar survey conducted in 1999, and is far greater than the 41% figure from 1995.<sup>36</sup> As veteran journalists have observed, such concerns reflect the fact that “most of the corporations that own newspapers are focused on profits, not journalism.”<sup>37</sup>

(2) More than a quarter of the national journalists who responded to the survey (28%) believe that a loss of credibility with the public is one of the top problems facing the journalism profession.<sup>38</sup> As the Pew Research Center’s report states:

[W]hile the quality of coverage and business concerns are seen as the leading problems facing journalism, the *single* word mentioned more frequently than any other by journalists assessing their profession is “*credibility*.” Roughly a quarter of both national and local journalists mentioned problems with public trust and confidence in some form, and one-in-five specifically mentioned credibility as the biggest concern for the profession.<sup>39</sup>

---

34. THE PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS, HOW JOURNALISTS SEE JOURNALISTS IN 2004 (2004), *available at* <http://people-press.org/reports/pdf/214.pdf> [hereinafter BOTTOM-LINE PRESSURES].

35. *Id.* at 1.

36. *Id.*

37. See LEONARD DOWNIE, JR. & ROBERT G. KAISER, THE NEWS ABOUT THE NEWS: AMERICAN JOURNALISM IN PERIL 68 (2002).

38. BOTTOM-LINE PRESSURES, *supra* note 34, at 6.

39. *Id.* at 7 (second emphasis added).

What is most important here is that print journalists are “more likely than those in broadcast to see credibility as the biggest problem facing journalism today. Four in ten journalists (thirty-nine percent) working at national newspapers, magazines and wire services say credibility is the biggest problem, compared with just fifteen percent at national TV and radio outlets.”<sup>40</sup>

Closely related, nearly half (47%) of the national journalists who responded to the survey said that it was, indeed, a valid criticism that journalists are “out of touch” with the public.<sup>41</sup>

(3) A frighteningly high percentage of national journalists (45% of respondents in 2004, compared to only 30% in 1995) find it a valid criticism of the press that “reporting is increasingly sloppy and error-prone.”<sup>42</sup>

(4) There are important political differences between journalists and the public they serve, as “news people – especially national journalists – are more liberal, and far less conservative, than the general public.”<sup>43</sup> Closely related is the fact that 34% of the journalists who responded from national media outlets considered themselves “liberal,” while only 7% considered themselves “conservative.” When compared to the general public, where only 20% considered themselves “liberal” and 33% considered themselves “conservative,” the gap among journalists does not reflect the distribution of the population as a whole.<sup>44</sup> Therefore, if a large segment of the public believes that the press is biased based upon political affiliation, the press becomes less credible in the eyes of the people who fall within that ideological category. Put differently, the uneven political representation in the news media creates disconnect between the public and the press that, in turn, carries the potential to create a perception that harms credibility.

(5) Only 15% of national print journalists and 9% of local print journalists who responded to the survey identified the

---

40. *Id.*

41. *Id.* at 10.

42. *Id.* at 1.

43. *Id.* at 24.

44. *Id.*

watchdog role of the press as a strength of the journalism profession.<sup>45</sup> As an example of the failure to perform this checking function, the survey found that “[s]olid majorities of national print and TV journalists, as well as Internet journalists, say the media has not been critical enough in its coverage of the [Bush] administration.”<sup>46</sup>

In summary, many journalists identify major problems with their own credibility, admit that they may be out of touch with the public, and acknowledge that reporting is increasingly sloppy and error prone, something that seems likely to erode their credibility further. In addition, many worry about profit pressures hurting their own news coverage, and very few identify the watchdog role that is privileged under the First Amendment as what journalists do best today. The wide disparity between self-identified liberals and conservatives among the journalism ranks may be another reason for the credibility loss for many mainstream outlets among conservative news consumers. In particular, another Pew Research Center study, this one a nationwide poll of 3000 adults conducted in April and May of 2004, suggests that “Republicans have become more distrustful of virtually all major media outlets over the past four years.”<sup>47</sup> Such data confirms journalists’ own beliefs that there is deep concern that the press lacks credibility in the eyes of a growing segment of the public.

### *B. State of the First Amendment 2004 Survey*

The 2004 edition of the First Amendment Center’s<sup>48</sup> annual *State of the First Amendment* survey also contains data suggesting

---

45. *Id.* at 9.

46. *Id.* at 14.

47. THE PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS, NEWS AUDIENCES INCREASINGLY POLITICIZED: ONLINE NEWS AUDIENCE LARGER, MORE DIVERSE 1 (2004), available at <http://people-press.org/reports/pdf/215.pdf> [hereinafter BIENNIAL NEWS CONSUMPTION SURVEY].

48. For background on the First Amendment Center, located in Arlington, Virginia and at Vanderbilt University in Nashville, Tennessee, see <http://www.firstamendmentcenter.org>.

that there are serious problems of journalistic credibility today.<sup>49</sup> In particular, more than one-third (42%) of the 1002 adults surveyed nationwide by the Center for Survey Research & Analysis at the University of Connecticut,<sup>50</sup> believe that “the press in America has *too much freedom* to do what it wants.”<sup>51</sup> In stark contrast, only 12% of those surveyed believe that the press has “*too little freedom* to do what it wants.”<sup>52</sup> If the press actually was perceived as credible by the public, one would expect far fewer people to say that it has too much freedom and far more people to say that it has too little freedom. A press that is seen as abusing its freedom by more than 40% of American adults, however, is a press ripe for government intervention to increase its credibility and importance to the public.

Importantly, the negativity toward the press revealed by the survey cannot be blamed on conservatives who have become increasingly disenchanted with the media. Of the individuals surveyed, 36% identified themselves as Democrats while only 26% identified themselves as Republicans.<sup>53</sup>

The survey, tapping into a similar sentiment but with a different question that used the more general word “media” instead of the more specific word “press,” also posed the following query: “Some people believe that the media have too much freedom to publish whatever they want. Others believe there is too much government censorship. Which of these beliefs lies closest to your own?”<sup>54</sup> The results again suggest an under-appreciation of First Amendment freedom given to the media: nearly half of those surveyed (49%) said there is too much media freedom while only a third (34%) said there is too much government censorship.

Furthermore, the relevance of the First Amendment in protecting the press is not obvious to many in the American public.

---

49. FIRST AMENDMENT CENTER, STATE OF THE FIRST AMENDMENT 2004 (2004), *available at* <http://www.firstamendmentcenter.org/pdf/SOFA2004.pdf> [hereinafter STATE OF THE FIRST AMENDMENT].

50. *Id.* at 43-44 (describing the methodology used in the survey).

51. *Id.* at 2 (emphasis added).

52. *Id.* (emphasis added).

53. *Id.* at 41.

54. *Id.* at 32.

In fact, only 15% of the adults surveyed could name freedom of the press as a specific right guaranteed by the First Amendment.<sup>55</sup>

Taken as a whole, these figures suggest that the press lacks credibility with the public and is perceived as abusing the freedom that it has been given. This sentiment provides the foundation for government intervention in an attempt to bolster its credibility.

### *C. Public Response to Media Ownership Issues & a Judicial Rebuke*

In 2003, the Federal Communications Commission approved changes, by a narrow three to two vote, to allow further concentration of media ownership, including cross-ownership of a newspaper and television stations in the same city.<sup>56</sup> By doing so, the FCC “prompted activist groups to push for media reform.”<sup>57</sup> Those activists believe that “too few companies control the airwaves, and thus, radio and TV broadcasters aren’t doing a good enough job.”<sup>58</sup>

When FCC Chairman Michael Powell proposed the move that would permit companies “to increase their ownership concentration, the public outcry was deafening. The FCC received some two million complaints opposing the rule changes.”<sup>59</sup> After Powell proposed the moves in 2004 allowing further media ownership consolidation, it “didn’t take long for the public outcry to begin. The FCC was inundated with hundreds of thousands of

---

55. *Id.* at 23.

56. See Susan Nielsen, *More to Do After Portland FCC Lovefest*, SUNDAY OREGONIAN, June 27, 2004, at F3 (describing the FCC’s decision as “the most sweeping rewrite of media regulations in a generation” and noting that the changes would “allow a handful of media giants to further run the news, much like Clear Channel already picks most of the songs for the nation’s radios. Under one change, a corporation could own as many as three television stations, eight radio stations, a cable operator and a newspaper in a single market.”).

57. L.A. Lorek, *FCC Seeks Input on Broadcasters*, SAN ANTONIO EXPRESS-NEWS, Jan. 25, 2004, at 1L.

58. *Id.*

59. Bob Keefe, *Deregulation the Dominant Theme for FCC’s Powell*, ATLANTA J.-CONST., Dec. 25, 2003, at C3.



angry letters and petitions from consumer advocates, civil rights and religious groups and even the National Rifle Association.”<sup>60</sup>

Such a massive response from diverse segments of the public suggests that citizens are very concerned about who owns and controls the media. Indeed, the FCC “was flooded with millions of e-mails and postcards protesting the new rules, bringing together unlikely and bipartisan coalitions,”<sup>61</sup> demonstrating that the public will support caps on newspaper ownership in addition to regulations over television and radio. In fact, one aspect of the Commission’s decisions that drew criticism by the public was its move to lift “a 1975 ban on the ownership of both a newspaper and a television or radio station in the same market.”<sup>62</sup>

Significantly, the public outcry was followed by a judicial victory in the June 2004 case of *Prometheus Radio Project v. FCC*, where the United States Court of Appeals for the Third Circuit rejected many of the FCC’s efforts to loosen ownership rules.<sup>63</sup> One aspect of the decision dealt directly with newspaper ownership. The Third Circuit concluded that while the FCC’s decision to repeal its newspaper/broadcast cross-ownership ban was constitutional and within its powers, the FCC nonetheless needed to either justify or further modify its specific cross-media limits on remand.<sup>64</sup> Those

---

60. Anthony Violanti, *After a Rough Year, FCC Awaits Court Ruling*, BUFFALO NEWS (N.Y.), Jan. 25, 2004, at P14.

61. Frank Ahrens, *Powell Calls Rejection of Media Rules a Disappointment*, WASH. POST, June 29, 2004, at E5.

62. Sallie Hofmeister, *In Media Decision, the Little Guys Lost*, L.A. TIMES, June 26, 2004, at C1.

63. 373 F.3d 372 (3d Cir. 2004), *cert. denied*, \_\_\_ U.S. \_\_\_, 125 S. Ct. 2904 (2005).

64. *Id.* at 419-20. The appellate court wrote:

[W]e affirm the power of the Commission to regulate media ownership. In doing so, we reject the contention that the Constitution or § 202(h) of the 1996 Act somehow provides rigid limits on the Commission’s ability to regulate in the public interest. But we must remand certain aspects of the Commission’s Order that are not adequately supported by the record. Most importantly, the Commission has not sufficiently justified its particular chosen numerical limits for local

limits “prohibit newspaper/broadcast combinations and radio/television combinations in the smallest [Nelson Designated Market Areas], i.e., those with three or fewer full-power commercial or noncommercial television stations.”<sup>65</sup> In contrast, “in the largest markets – those with more than eight television stations – common ownership among newspapers and broadcast stations is unrestricted.”<sup>66</sup> The decision to require further evidence on the part of the FCC indicates that courts and not just the public, are concerned about ownership limits, including those in the realm of newspapers. Overall, the decision was hailed as “a victory for big-media critics.”<sup>67</sup>

Another important point that militates in favor of capping the number of newspapers that a single entity can own is the press’s failure to cover, in large part, the FCC’s efforts to deregulate and loosen ownership rules. As Charles Layton wrote in a lengthy and scathing analysis, “as the FCC moved toward final action . . . that would greatly benefit a handful of large companies, *most newspapers* and broadcast outlets owned by those companies barely mentioned the issue.”<sup>68</sup> Layton added that one of the main claims by opponents of media ownership deregulation “is that the more giant conglomerates come to control the media, the more they stifle viewpoints at odds with their interests. Their failure to cover the FCC story seemed like Exhibit A.”<sup>69</sup>

---

television ownership, local radio ownership, and cross-ownership of media within local markets. Accordingly, we partially remand the Order for the Commission’s additional justification or modification, and we partially affirm the Order. The stay will continue pending our review of the Commission’s action on remand.

*Id.* at 382.

65. *Id.* at 388.

66. *Id.*

67. Paul Davidson, *Looser Media Rules Tossed*, USA TODAY, June 25, 2004, at 1B. *But see* Hofmeister, *supra* note 62, at C1, C9.

68. Charles Layton, *News Blackout*, AM. JOURNALISM REV., Dec. 2003-Jan. 2004, at 18, 20 (emphasis added).

69. *Id.*

Such self-censorship of self-coverage is troublesome. It reinforces the need for more voices in the marketplace of ideas. Under the current media oligopoly, too few voices wield too much power to silence coverage of issues, such as those affecting ownership, that directly impact the public. The self-censorship described by Layton illustrates that there is a serious credibility problem with the news media, and that more voices are needed in order to give more information the chance to flow to the public.

In summary, recent survey data support the need for government intervention to improve press credibility. This data was drawn from both practicing journalists and members of the public, and the need for intervention is particularly strong when the data is coupled with the public's response to the FCC's efforts to roll back ownership limitations, including those that affect newspapers.

Part II of this Article defends the three intervention proposals set forth in the Introduction. The first proposal calls for open disclosure of the editors' decision-making processes, the second requires disclosure of journalists' political affiliations, and the third sets newspaper ownership limitations. These measures are intended to rectify the problems identified and described by the survey results and public outcry discussed above. Each of those problems ultimately relates, as noted earlier, to press credibility in the eyes of the very same public that the press, when all is said and done, should serve.

## II. DEFENDING THE NEWSPAPER CREDIBILITY ENHANCEMENT ACT: WITH OPENNESS AND DIVERSITY COMES CREDIBILITY

The Introduction articulated three measures designed to enhance press credibility. Those steps, based on the data and facts set forth in Part I, are defended here. Before defending the three measures, it is important to set forth the judicially imposed standard under which such a defense must pass muster.

*A. The Legal Standard*

The Newspaper Credibility Enhancement Act requires newspapers to print particular content.<sup>70</sup> First, on a weekly basis, newspapers must print an explanation of the selection process for the lead stories they decide to print. Secondly, they must print the reporters' party affiliations next to their bylines. Because it is a content-based regulation of the press,<sup>71</sup> the NCEA would be subject to a strict-scrutiny standard of judicial review were it to be challenged in court.<sup>72</sup> The strict-scrutiny test requires "the government [to] use the least restrictive means of advancing a compelling government interest."<sup>73</sup> Thus, the test breaks down neatly into two parts "to ensure that the regulations are (1) justified by a compelling government interest and (2) narrowly drawn so as to impose the minimum abridgment of free expression."<sup>74</sup>

All of the changes proposed in this Article are designed to serve the compelling interest of fostering a credible press – one that is respected by the public and is perceived as trustworthy in playing a vital watchdog function. As noted in the Introduction, the Supreme Court already has recognized the interest of a watchdog press.<sup>75</sup>

Moreover, press credibility is not something that only journalists consider important. Both legal scholars and courts value press credibility. For instance, Professor Blake Morant of Washington and Lee University School of Law wrote in a recent law journal article that credibility is "a primary objective in the

---

70. See *supra* pp. 9-15.

71. See generally DANIEL A. FARBER, *THE FIRST AMENDMENT* 21-38 (2d ed. 2003) (discussing and explaining the distinctions between content-based laws and content-neutral laws).

72. *United States v. Playboy Entm't. Group, Inc.*, 529 U.S. 803, 813 (2000) (writing that "a content-based speech restriction" is constitutional "only if it satisfies strict scrutiny," and defining this test to mean that a statute "must be narrowly tailored to promote a compelling Government interest").

73. *Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1251 (11th Cir. 2004).

74. KENT R. MIDDLETON ET AL., *THE LAW OF PUBLIC COMMUNICATION* 35 (6th ed. 2004).

75. *Leathers v. Medlock*, 499 U.S. 439, 447 (1991).

journalistic profession.”<sup>76</sup> Morant added that “the media are aware of the need to maintain credibility,”<sup>77</sup> and “[i]n order to maximize the size of its audience, a media source must establish a certain level of credibility.”<sup>78</sup>

Courts have directly linked credibility to the First Amendment’s protection of a free press. As the Supreme Court of Washington noted in *Nelson v. McClatchy Newspapers, Inc.*, “[e]ditorial integrity and credibility are core objectives of editorial control and thus merit protection under the free press clauses”<sup>79</sup> of both the First Amendment and the Washington state constitution. The Washington high court added that its “conclusion is also supported by academic texts showing credibility to be crucial to a paper’s ability to operate.”<sup>80</sup> The court furthermore interpreted the United States Court of Appeals for the District of Columbia’s 1980 opinion in *Newspaper Guild of Greater Philadelphia v. N.L.R.B.*<sup>81</sup> as standing for the proposition that “a newspaper’s ability to control its credibility falls within the sphere of First Amendment protection.”<sup>82</sup> The Supreme Court of Washington’s statement about the relationship between press freedom and credibility has been cited favorably by at least one federal court,<sup>83</sup> and one legal scholar recently said the opinion in *Nelson* stood for the proposition “that a newspaper’s credibility was so central to the meaning of press that even the personal political activities of a reporter could be controlled if they jeopardized institutional credibility.”<sup>84</sup>

Beyond legal scholars and courts, journalists themselves view credibility as a compelling interest. The American Society of

---

76. Blake D. Morant, *The Endemic Reality of Media Ethics and Self-Restraint*, 19 NOTRE DAME J. L. ETHICS & PUB. POL’Y 595, 611 (2005).

77. *Id.* at 632.

78. *Id.* at 605.

79. *Nelson v. McClatchy Newspapers, Inc.*, 936 P.2d 1123, 1131 (Wash. 1997) (en banc).

80. *Id.*

81. 636 F.2d 550 (D.C. Cir. 1980).

82. *Nelson*, 936 P.2d at 1131.

83. *Manson v. Little Rock Newspapers, Inc.*, 42 F. Supp. 2d 856, 866 (E.D. Ark. 1999) (quoting *Nelson*, 936 P.2d at 1131).

84. Jon Paul Dilts, *The First Amendment and Credibility: Revisiting Nelson v. McClatchy Newspapers*, 10 COMM. L. & POL’Y 1, 22 (2005).

Newspaper Editors, for instance, describes on its web site what it calls “the vital issue of building reader credibility.”<sup>85</sup> In trying to achieve this goal, the web site seems to acknowledge that “editors everywhere are struggling mightily to figure out what they can do to restore their readers’ trust.”<sup>86</sup>

In addressing the compelling interest of enhancing press credibility, each of the changes proposed in the NCEA is narrowly tailored to serve that objective. For example, there is minimal intervention in the realm of content that requires only disclosure of information. The NCEA does *not* tell journalists what stories to cover, how to cover those stories, or what political affiliation they must have. Instead, all that is required to comply with the Act is the addition of *one word* next to each reporter’s byline, such as “Republican” or “Democrat” or “Libertarian.” In addition, newspapers only need to add *one page* published just once each week, where editors reasonably explain how and why they chose the lead stories that ran “above the fold” on the front page of the paper for each edition during the previous week. This page does not even need to be a printed page, but it can be posted on the newspaper’s website in order to save printing costs.

These obligations are imposed on newspapers regardless of the stories they cover. There is no penalty imposed on a newspaper for covering a particular viewpoint more than another one or for not covering particular stories at all. There is no requirement that newspapers must devote a specific number of pages to political coverage or business matters or sports or entertainment. Put differently, there is no penalty imposed for a newspaper’s editorial judgment, which is, “the most important quality”<sup>87</sup> in defining the press’s claim to freedom as institutional speaker.

Thus, the Act is different from the law declared unconstitutional in *Tornillo* thirty years ago. In particular, the

---

85. American Society of Newspaper Editors, *Credibility*, <http://www.asne.org/index.cfm?id=3> (last visited Oct. 16, 2005).

86. David Shaw, *Restoring Trust in ‘All the News That’s Fit to Print,’* L.A. TIMES, May 22, 2005, at E13.

87. Randall P. Bezanson, *The Developing Law of Editorial Judgment*, 78 NEB. L. REV. 754, 760 (1999) (discussing the judgment process of the press).

United States Supreme Court wrote in that case that Florida's right-of-reply statute "exact[s] a penalty on the basis of the content of a newspaper."<sup>88</sup> The statute was triggered only when a newspaper ran content assailing a candidate's character or official record. If a newspaper did not assail a candidate, however, there would be no penalty; the newspaper would not be required to print anything by the candidate.

Unlike the law struck down in *Tornillo*, the Newspaper Credibility Enhancement Act does not penalize a newspaper for running particular content. Its application is *not* triggered by a newspaper's choice or decision to print certain material. The Act applies evenhandedly to all daily newspapers, regardless of their content or position on an issue. It is, then, more closely akin to the content-neutral must-carry rules imposed on cable operators and upheld, despite First Amendment challenges, in 1997 by the United States Supreme Court in *Turner Broadcasting System, Inc. v. FCC*.<sup>89</sup> Those rules require "cable television systems to dedicate some of their channels to local broadcast television stations."<sup>90</sup> The Supreme Court observed that these must-carry rules were not content-based, in part, because:

They do not penalize cable operators or programmers because of the content of their programming. They do not compel cable operators to affirm points of view with which they disagree. They do not produce any net decrease in the amount of available speech. And they leave cable operators free to carry whatever programming they wish on all channels not subject to must-carry requirements.<sup>91</sup>

Similarly, the Newspaper Credibility Enhancement Act does not compel newspaper editors to affirm points of view with

---

88. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

89. 520 U.S. 180 (1997).

90. *Id.* at 185.

91. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 647 (1994), *aff'd*, 520 U.S. 180 (1997).

which they disagree. Instead, it only requires an explanation of the reasoning behind the selection process of the week's top news stories. The Act also does not produce any net decreases in the amount of available speech. Under the Act, newspapers are compensated for any lost revenue resulting from the page devoted to explaining editorial judgment. Thus, newspapers can add a page of content. While this certainly means taxpayer dollars will fund such an initiative, the monetary cost is outweighed by the informational gain. Newspapers are alternatively given the option to post the explanations of their decision-making processes on a website rather than in the newspaper, thus eliminating any loss of space or decrease in the amount of available space.

If, as Professor Bezanson writes, editorial judgment is “the core idea of freedom of the press,”<sup>92</sup> and it is protected to ensure the “selection of material that will inform a self-governing citizenry,”<sup>93</sup> then the public needs to be informed about how the editorial judgment process works. Put differently, if the press receives constitutional protection as an institution<sup>94</sup> because it is an institution that is supposed to serve the public, then it can only do this effectively if the public both respects the press as an institution and understands how and why it gives coverage to certain events, incidents, and individuals.

In summary, the Newspaper Credibility Enhancement Act is designed to serve a compelling interest in improving press credibility in order to bolster the watchdog role of the press, and the Act's means are narrowly tailored to achieve that goal. What follows are defenses for each section of the Act.

---

92. Bezanson, *supra* note 87, at 856.

93. *Id.*

94. *See id.* at 757 (writing that “the Free Press Clause extends protection to an institution”).



*B. The Act's Three Components*

## 1. Explaining News Selection &amp; News Judgment

The first component of the Act, which calls for required space on op-ed pages for newspapers to explain their decision-making processes to the public, is supported directly by the Society of Professional Journalists' ethics code. That code provides, in relevant part, that journalists should "[c]larify and explain news coverage and invite dialogue with the public over journalistic conduct."<sup>95</sup> The Act simply transforms what already is an ethical responsibility for many journalists<sup>96</sup> into a legal obligation. Such a shift from an ethical obligation to a legal one is not unheard of in First Amendment jurisprudence. Courts have transformed, for instance, the ethical obligation of journalistic objectivity into a recognized legal principle.<sup>97</sup>

The first part of the proposed act is a logical corollary of a practice that journalists engage in on a daily basis: asking *others* to explain their actions, plans, and problems so that the reading public may know about them. Journalists want everyone from public officials to Hollywood celebrities to explain their conduct and to air their dirty laundry for readers to view. Requiring journalists to explain how they choose stories and select items for coverage is simply placing the shoe on the other foot.

If journalists disclose their decision-making processes to the public and allow the readers they serve to see and understand the

---

95. Society of Professional Journalists, Code of Ethics, [http://www.spj.org/ethics\\_code.asp](http://www.spj.org/ethics_code.asp) (last visited Oct. 16, 2005) (emphasis added).

96. According to the Society of Professional Journalists' website, the organization's ethics code "is voluntarily embraced by thousands of writers, editors, and other news professionals." *Id.*

97. See Clay Calvert, *The Law of Objectivity: Sacrificing Individual Expression for Journalism Norms*, 34 GONZ. L. REV. 19 (1998-99) (arguing that the Supreme Court of Washington turned the concept of objectivity in journalism into legal practice in the case of *Nelson v. McClatchy Newspapers, Inc.*, 936 P.2d 1123, cert. denied, 522 U.S. 866 (1997)).

inner workings of the journalism profession, they will be perceived as more credible by the public. Accordingly, after the Jayson Blair fiasco at the *New York Times*, the newspaper created the new position of public editor.<sup>98</sup> By publicly addressing the complaints, comments and suggestions of readers, a newspaper may appear more accountable and, in turn, credible, to its readers. As Professor Louis Alvin Day writes:

Perhaps the most visible example of a commitment to self-criticism is the presence, in some media organizations, of an ombudsman, hired to investigate questionable journalistic conduct and to recommend action. Proponents of the ombudsman system argue that ombudsmen can most effectively “funnel” reader complaints, reduce the likelihood of libel complaints, *help cement a paper’s relationship with its readers*, serve as a liaison with the public, and elevate the ethical awareness of the staff.<sup>99</sup>

Conversely, the harms caused by disclosing story selection processes are non-existent. How a choice is made in the selection of a lead story, after all, is not some trade secret. The Newspaper Credibility Enhancement Act is not asking for the secret formula for Coca-Cola. All it requires of journalists is to no longer keep secret the thought processes, guidelines, and considerations they use when selecting specific events to cover. With openness comes credibility; secrecy, conversely, “shuts out criticism and feedback.”<sup>100</sup>

Furthermore, keeping information secret from the public is anathema to one of journalism’s most basic canons – the obligation

---

98. See Seth Mnookin, *Fast Chat: Daniel Okrent*, NEWSWEEK, Dec. 29, 2003, at 12 (writing that, in 2003, “Okrent, a longtime journalist, was tapped to be the *New York Times*’ first public editor, a position created in the wake of the plagiarism and management scandals”).

99. LOUIS ALVIN DAY, *ETHICS IN MEDIA COMMUNICATIONS: CASES & CONTROVERSIES* 47 (4th ed. 2003) (emphasis added).

100. SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* 25 (1982).

to tell the truth. “[S]eeking the truth (and presenting it if and when possible) is a fundamental professional and ethical tenet of journalism.”<sup>101</sup> Likewise, “[t]he press’s obligation to print the truth is a standard part of its rhetoric. Virtually every code of ethics begins with the newsperson’s duty to tell the truth under all conditions.”<sup>102</sup> If journalists, then, are professional truth seekers and truth tellers, they should not object to a law that requires of them only one full page of text each week on which to tell the truth about the selection process for the lead stories from the previous week’s papers.

Finally, another reason why newspaper editors should explain how they select stories relates to a communication research theory called the agenda-setting function of the press.<sup>103</sup> The agenda-setting theory suggests that the news media play a powerful role, by choosing which issues to cover, in shaping the public’s beliefs about which issues are important. As Stanford University Professor Shanto Iyengar writes, “by covering some issues and ignoring others, the media set the public agenda – they influence what people view as important issues.”<sup>104</sup> Further, Professor Maxwell McCombs observes that “[t]he core theoretical idea underlying agenda setting is that elements prominent in the media picture become prominent in the audience’s picture.”<sup>105</sup>

101. JOHN C. MERRILL, JOURNALISM ETHICS: PHILOSOPHICAL FOUNDATIONS FOR NEWS MEDIA 175 (1997). John Merrill is a professor at the University of Missouri.

102. CLIFFORD G. CHRISTIANS ET AL., MEDIA ETHICS: CASES AND MORAL REASONING 59 (6th ed. 2001). Clifford Christians is a professor at the University of Illinois.

103. See generally STANLEY J. BARAN & DENNIS K. DAVIS, MASS COMMUNICATION THEORY: FOUNDATION, FERMENT, AND FUTURE 311-15 (3d ed. 2003) (describing both the historical underpinnings of the agenda-setting theory and research regarding its viability as a function played by the press).

104. Shanto Iyengar, *Overview: The Effects Of News On The Audience: Minimal Or Maximal Consequences*, in DO THE MEDIA GOVERN?: POLITICIANS, VOTERS, AND REPORTERS IN AMERICA 211, 213 (Shanto Iyengar & Richard Reeves eds., 1997).

105. Maxwell McCombs & George Estrada, *The News Media and the Pictures in Our Heads*, in DO THE MEDIA GOVERN?: POLITICIANS, VOTERS, AND REPORTERS IN AMERICA 237, 237 (Shanto Iyengar & Richard Reeves eds., 1997).

If the media's agenda shapes the public's agenda, then the first provision of the Newspaper Credibility Enhancement Act is completely logical because it requires editors to explain the processes that shape their newspapers' agendas. Such openness, in turn, bolsters credibility by demonstrating that there are no hidden agendas – that the public is not being manipulated by the press. Today, some conservatives believe the media have a liberal agenda, and many liberals believe that some elements of the media, such as FOX News, have a conservative agenda.<sup>106</sup> A press that shares its news agenda will be a more credible institution.

The greater the public's access to information about the news selection process, the greater knowledge the public will have to understand the practice of journalism. With openness, disclosure, and access to information comes credibility.

## 2. Political Party Disclosure

The second aspect of the Newspaper Credibility Enhancement Act requires journalists to identify their registered political party affiliation immediately under or next to their story bylines. This is a one-word, compelled-speech obligation; all that is necessary for compliance is the addition of one word, such as "Democrat" or "Republican" or "Libertarian." Typically, reporters never reveal such information in a byline, and newspaper readers do not know the political party affiliation of the various beat reporters working at the local newspaper.

Political party disclosure is necessary because it provides readers with greater information about the author of the story in question, thus giving readers an additional fact to use in judging the credibility of the story. The maxim here is simple: the more information the reader has, the better off he or she is. A

---

106. See BIENNIAL NEWS CONSUMPTION SURVEY, *supra* note 47, at 2 (noting that "Fox ranks as the most trusted news source among Republicans but is among the least trusted by Democrats"); see also David Bauder, *Study Finds CNN, Fox Viewers Divided: Research Finds Growing Delineation Between Left, Right*, CHARLESTON DAILY MAIL (W. Va.), June 9, 2004, at 6D (describing some of the results of the Pew Research Center for the People and the Press).

conservative reader, for instance, who knows that the journalist who writes a particular story is a Democrat may now assess for him or herself the credibility of the story in the context of the political affiliation of its writer. The same holds true for a liberal reader who reads a story by a writer identified as a Republican.

Today, many believe that journalists are biased, either leaning left or leaning right. Recently, there have even been a number of top-selling books, such as *Bias*<sup>107</sup> and *What Liberal Media?*,<sup>108</sup> written on this subject. The idea that journalists can be completely objective in their reporting is viewed with some skepticism today:

Few people anymore accept the idea of a journalist as an opinionless, emotionless entity that passes news from its sources to the public. Most accept that journalists, like everyone else, are shaped by their background, training and social experiences. They can see the world only through their own subjective vantage points. When they decide that one thing is newsworthy and another is not, their culture, beliefs and social heritage play a major role.<sup>109</sup>

By exposing their political party affiliations to the public, journalists would build credibility and respect with the public. The message sent by the journalist is simple: "Here's my story. Here's my party affiliation. Now you have more information on which to evaluate my reportage. I'm not hiding anything."

---

107. BERNARD GOLDBERG, *BIAS: A CBS INSIDER EXPOSES HOW THE MEDIA DISTORT THE NEWS* (2002). Goldberg followed up *Bias* with another blistering and best-selling attack on the news media one year later. See BERNARD GOLDBERG, *ARROGANCE: RESCUING AMERICA FROM THE MEDIA ELITE* 26 (2003) (writing, among other assertions, that "there's been way too much suppression in recent years of ideas that fail to pass the liberal litmus test").

108. ERIC ALTERMAN, *WHAT LIBERAL MEDIA? THE TRUTH ABOUT BIAS AND THE NEWS* (2003).

109. RON F. SMITH, *GROPING FOR ETHICS IN JOURNALISM* 77 (5th ed. 2003). Ron Smith is a journalism professor, and this is a leading textbook on media ethics.

If a journalist is not registered with a political party, the Newspaper Credibility Enforcement Act does *not* impose any obligation on the journalist to report any information. Thus, the second part of the Act appears, at first blush, to be easily avoidable by a journalist who simply refuses to register with a political party. Yet the very absence of a political party affiliation next to a reporter's byline is itself information to the reader. A reader, knowing that reporters are required to disclose party affiliation on the bylines, would wonder why a particular reporter did not have such an affiliation. The reader, in turn, might then be more skeptical of that reporter, believing he or she is hiding something by not registering.

Disclosure of a reporter's political party affiliation will not provide all relevant information about a reporter's beliefs that may influence how a story is written. For instance, a reporter who identifies herself as "Republican" may also support a woman's right to choose and thus, not conform to every Republican stereotype. Nonetheless, identification of party affiliation adds one more piece of information to the public's knowledge when reading and evaluating a story. Of course, it would be ideal if reporters voluntarily disclosed more information to their readers in their bylines. For example, if a journalist reporting on gay marriage identifies herself in the byline of her story as a "heterosexual cultural conservative," readers get more relevant information than if that journalist only lists her party affiliation. Such altruistic revelations, however, are not likely to be forthcoming. In addition, the compelled disclosure of one's political party is a far more narrowly tailored remedy that involves the addition of just one word to a byline.

### 3. The Ownership Cap

The third and final section of the Newspaper Credibility Enhancement Act imposes a cap or limit on the total number of print newspapers that any single entity could own. This provision is needed to preserve what little diversity and choice of print news

voices remain in the United States. Gannett already owns ninety-nine newspapers in the United States.<sup>110</sup> It has a powerful voice in the metaphorical marketplace of ideas.<sup>111</sup> But what is wrong with that?

As one commentator stated, “[t]hrough mergers and acquisitions, private media companies have so consolidated their hold on the mainstream media that they have effectively frozen out dissenting or unorthodox voices and compromised editorial integrity in the quest for the almighty dollar.”<sup>112</sup> He adds that “[j]ournalists feel the impact of consolidation even earlier than the general public.”<sup>113</sup>

Imposing a cap on the number of newspapers that a single entity may own may improve journalism in the watchdog function described in the Introduction of this Article. As Professor C. Edwin Baker writes, “[a] dispersal of media ownership likely provides, and concentration often undermines, two valuable safeguards to the well-being of a democratic society. Dispersal can support performance of the “checking function” or watchdog role. It is also likely to reduce the media’s own vulnerability to certain types of corruption.”<sup>114</sup> A cap on newspaper ownership by chains might provide for the preservation of what few locally and family-owned newspapers remain. This, as Professor Baker observes, carries a distinct benefit in enhancing journalistic credibility:

[O]wners living in the community where the media product is distributed and owners closer to journalistic/editorial process are generally likely to exercise more desirable decision-making control and to be relatively more concerned with quality and less single-mindedly focused on profit. Their identity is likely more

---

110. See Gannett Co. Company Profile, *supra* note 6.

111. See *supra* note 5 (describing the marketplace metaphor).

112. Eric B. Easton, *Annotating the News: Mitigating the Effects of Media Convergence and Consolidation*, 23 U. ARK. LITTLE ROCK L. REV. 143, 156 (2000).

113. *Id.*

114. C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 FLA. L. REV. 839, 906 (2002).

at stake in relation to the quality of the product, an effect reinforced by being personally close to the consumers and professionally close to the journalism critics who evaluate them primarily on the basis of content quality and not merely the firm's economic success.<sup>115</sup>

A nationwide ownership limit already exists in broadcasting, a limit that remains in place after the June 2004 appellate court opinion in *Prometheus Radio Project v. FCC*.<sup>116</sup> In the 2004 Consolidated Appropriations Act, Congress capped the number of commonly owned stations to those reaching no more than 39% of the national audience.<sup>117</sup>

A national audience reach limitation is impossible in the print realm. Newspapers such as *USA Today*, the *New York Times*, and the *Wall Street Journal* already are nationwide in circulation and can reach, theoretically, 100% of the people in the United States. That said, a numerical cap on the number of newspapers that a single entity may own is the better solution than a percentage-of-audience measure.

The Act proposed in this Article does not fix the precise number of newspapers that would serve as the cap or limit. Congressional study is necessary here to arrive at the precise figure, taking into account the concerns of *diversity*, *localism*, and *competition* about which the FCC is concerned in the broadcast realm.<sup>118</sup> If readers have a diverse range of sources from which they may select stories to read, and if some of those sources are local and thus carry the benefits of localism described by Professor Baker above,<sup>119</sup> then the press, as an institution protected by the First Amendment, will be perceived as more credible by the public.

---

115. *Id.* at 904.

116. 373 F.3d 372 (3d Cir. 2004), *cert. denied*, \_\_\_ U.S. \_\_\_, 125 S. Ct. 2904 (2005).

117. *Id.* at 396.

118. *Id.* at 386 (describing the FCC's "three traditional policy objectives in promoting the public interest – competition, diversity, and localism").

119. Baker, *supra* note 114, at 904.



The Newspaper Credibility Enhancement Act uses both content-based and structural regulations to revitalize the importance of free press. The intrusions on editorial control are minimal. The benefits are immense.

### CONCLUSION

The irony of the proposal described here calling for government intervention to restore press credibility, intervention in the name of the First Amendment's Free Press Clause, is that press credibility typically is thought to exist when the press is free and independent of government regulation. Yet the reality is that, on the thirty-first anniversary of the *Tornillo* opinion, private interests play perhaps a more dangerous role than do government regulations in inhibiting the envisioned role of the press as a credible and respected watchdog on both government and business.

Professor Lawrence Soley writes that "businesses and corporations now pose a greater threat to free speech than does government,"<sup>120</sup> and in their recent book, *The Elements of Journalism*, Bill Kovach and Tom Rosenstiel write:

The threat is no longer simply from government censorship. The new danger is that independent journalism may be dissolved in the solvent of commercial communication and synergistic self-promotion. The real meaning of the First Amendment – that a free press is an independent institution – is threatened for the first time in our history even without government meddling.<sup>121</sup>

The third part of the proposed Newspaper Credibility Enhancement Act, placing a cap on the number of newspapers that a single entity may own, is designed to mitigate the dangers of private censorship and corruption of the journalistic mission suggested by both Soley, Kovach, and Rosenstiel.

---

120. LAWRENCE SOLEY, CENSORSHIP INC. 9 (2002).

121. BILL KOVACH & TOM ROSENSTIEL, *THE ELEMENTS OF JOURNALISM* 18 (2001).

It is true that the “obvious refuge for any newspaper fleeing from governmental attempts to dictate its contents is the Constitution.”<sup>122</sup> However, it also is true that “[a]udience perception of credibility is considered vital to success of a given news outlet” and, in turn, credibility is linked to the protection of a free press.<sup>123</sup> Unfortunately, credibility today for journalism is dismally low. In fact, in addition to all of the evidence laid out in Part I, “a recent Gallup Poll says Americans rate the trustworthiness of journalists at about the level of politicians and as only slightly more credible than used-car salesmen. The poll suggests that only twenty-one percent of Americans believe journalists have high ethical standards, ranking them below auto mechanics. . . .”<sup>124</sup> Furthermore, “[c]redibility is on a steady downward track, with online enthusiasts rating the Internet a more credible news source than either newspapers or TV.”<sup>125</sup> The report added that:

In 2004 just half of those surveyed, according to Pew Research Center data, ranked the newspaper they are most familiar with as being believable (1 or 2 on a scale of 1 to 4). This is down nine percentage points from 2002, and 13 points from 1998. A scant 17% gave their newspaper the highest believability rating, a 1 on the scale, down from 27% in 1998.<sup>126</sup>

---

122. James M. Donovan, *Same-Sex Union Announcements: Whether Newspapers Must Publish Them, and Why We Should Care*, 68 BROOK. L. REV. 721, 771 (2003).

123. Laura M. Arpan & Arthur A. Raney, *An Experimental Investigation of News Source and the Hostile Media Effect*, 80 JOURNALISM Q. 265, 265 (2003).

124. Timothy W. Maier, *The Crumbling of the Fourth Estate*, INSIGHT ON THE NEWS, May 11, 2004, at 30.

125. Project for Excellence in Journalism & Rick Edmonds, *The State of the News Media 2005: Newspapers*, (2005) [http://www.stateofthemediamedia.org/2005/narrative\\_newspapers\\_publicattitudes.asp?cat=7&media=2](http://www.stateofthemediamedia.org/2005/narrative_newspapers_publicattitudes.asp?cat=7&media=2) (last visited Nov. 21, 2005).

126. *Id.* (citing The Pew Research Center for the People & the Press, Pew Research Center Biennial News Consumption Survey (June 8, 2004).

To remedy such dismal data, this Article proposes steps to bolster the credibility of the press in general, print journalism in particular, through both content and structural regulation.

The United States Supreme Court concluded thirty-one years ago in *Tornillo* that the “First Amendment bars a State from requiring a newspaper to print the reply of a candidate for public office whose personal character has been criticized by that newspaper’s editorials.”<sup>127</sup> Much has changed since the *Tornillo* decision. Today, with a radically reshaped media landscape,<sup>128</sup> increasing criticism of the press by both practicing journalists and the public, and a lack of institutional credibility, it is time to recognize that the First Amendment’s Free Press Clause does *not* bar the government from requiring a newspaper to print certain information. It also should not bar the government from imposing numerical limits on ownership. Indeed, the changes proposed in this article will enhance the role of a free press by making it more credible and significant in the eyes of the people it is designed to serve – the public. Without a meaningful free press, constitutional protection under the Free Press Clause is irrelevant.

---

127. *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring).

128. See *supra* notes 6–8 and accompanying text (describing changes in ownership patterns and readership).